(2)

Supreme Court, U.S.
FILED
APR 5 - 2005
OFFICE OF THE CLERK

No. 04-1197

In The

Supreme Court of the United States

LEONARD F. PRESCOTT, et al.,

Petitioners,

v.

LITTLE SIX, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY RASMUSSEN
Counsel of Record for Respondents
STEVEN F. OLSON
BLUEDOG, OLSON & SMALL, P.L.L.P.
5001 American Boulevard West,
Suite 500
Minneapolis, Minnesota 55437
Telephone (952) 893-1813

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	4
REASONS FOR DENYING THE PETITION	7
I. Petitioners seek to have this Court redetermine a factual issue, but Petitioners do not present any unsettled legal issue	8
A. The settled facts of this case do not present the question presented by Petitioners	8
B. There is no disagreement in the lower courts on the question presented by Petitioners	10
II. There is no disagreement in the lower courts on the very narrow issue which is presented by the facts of this case	11
A. The rule regarding *de facto* plans cannot be used to provide benefits to executive officers who, without their employer's approval, sought to establish ERISA plans for themselves	11
B. This Court should not grant certiorari to determine the narrow issue of how the rule regarding *de facto* ERISA plans applies to tribally owned and chartered corporations which operate Indian Gaming Facilities	16
III. The holding which Petitioners seek to have this Court review is only one of several barriers to federal court judgment in this matter	18
CONCLUSION	19

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Amato v. Western Union Int'l, Inc., 773 F.2d 1402 (2nd Cir. 1985) 13

Bennett v. Gill & Duffus, 1987 WL 34256 (S.D.N.Y. Dec. 29, 1987) 14

Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) (*en banc*) 13

Kenney v. Roland Parson Contracting Corp., 28 F.3d 254 (8th Cir. 1994) 14

Kulinski v. Medtronics Bio-Medicus, Inc., 23 F.3d 254 (8th Cir. 1994) 10

Moeller v. Bertrang, 801 F. Supp. 291 (D.S.D. 1992) 14

Prescott v. Little Six, Inc., 897 F. Supp. 1217 (D. Minn. 1995) 1, 2

Prescott v. Little Six, Inc., 387 F.3d 753 (8th Cir. 2004) 4

Prescott, et al. v. Little Six, Inc., et al., 284 F. Supp. 2d 1224 (D. Minn. 2003) 3

FEDERAL STATUTES

25 U.S.C. § 2702(3) 17

25 U.S.C. § 2703(9) 17

25 U.S.C. §§ 2701-2721 4

25 U.S.C. § 2710(b)(2)(B) 17

29 U.S.C. § 1001 9

29 U.S.C. §§ 1001-1053 1

TABLE OF AUTHORITIES – Continued

Page

COMMUNITY CASES

In re Trust Under Little Six Retirement Plans, Order (Shakopee Mdewakanton Sioux Trial Court Mar. 12, 2002) 7

In re Trust Under Little Six, Inc. Retirement Plans, 1 Shak. App. Reporter 182, 189, (Shakopee Mdewakanton Sioux Community App. 2001) 5, 6, 7, 9, 15

In re Leonard Prescott Appeal from 7/1/94 Gaming Commission Final Order, 1 Shakopee App. Reporter 146 (Shakopee Mdewakanton Sioux Community App. Ct., 1999) 12

In re Leonard Prescott, #94-0024, Findings of Fact (Shakopee Mdewakanton Sioux Community Gaming Comm'n 1994) 12

OTHER AUTHORITIES

68 Fed. Reg. 68179, 68182 (Dec. 5, 2003) 4

Community Business Corporation Ordinance § 4.11 5

STATEMENT OF THE CASE

This case arises from conduct of senior executives of an Indian gaming enterprise, Little Six, Inc. (LSI), who during 1993 and 1994 tried to dramatically increase their compensation by diverting LSI's assets, without LSI's approval, to certain "benefit plans" which they created for themselves. Those same senior executives are the Petitioners here. Their actions were discovered, their gaming licenses were revoked, and they were terminated by LSI. They have nevertheless repeatedly attempted to use the courts to get the fruit of their unlawful acts.

To that end, in April 1995, in a case before the Court of the Shakopee Mdewakanton Sioux Community (the Community), Petitioners asserted LSI had formally adopted the five "benefit plans" which are at the heart of their case, and alleged the plans were therefore governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1053 ("ERISA").

Despite the fact that the status of the purported plans and the disposition of assets in them was pending before the Community Court, in May 1995 Petitioners brought suit in the United States District Court for the District of Minnesota, naming as defendants LSI, the purported plans, and the alleged trustees of a putative trust containing assets to fund the purported plans. *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217 (D. Minn. 1995) ("*Prescott I*"). In *Prescott I*, Petitioners asserted that LSI had formally adopted the purported plans, and that the purported plans were governed by ERISA. Petitioners asserted that the Tribal Court lacked jurisdiction to determine the existence *vel non* of the purported plans. LSI moved to dismiss the suit.

Consistent with all other Courts, the District Court held that while the federal courts have exclusive jurisdiction over many ERISA issues, non-federal courts have jurisdiction to determine the existence *vel non* of purported ERISA plans. Because the Community Court action was prior-filed, and based upon the federal Indian law doctrine requiring exhaustion of tribal remedies, the District Court dismissed. *Id.* Petitioners did not appeal.

Petitioners thereafter appeared before the Community Court in proceedings to resolve the existence *vel non* of the purported plans and the purported trust. After an evidentiary hearing, the Community Trial Court held LSI that had adopted the proposed plans, ERISA applied, and the Community Court therefore lacked jurisdiction.

LSI appealed to the Community Appellate Court, asserting the Trial Court erred because no competent evidence existed in the record that LSI's Board of Directors, which was charged with the duty and vested with exclusive authority to set officers' compensation, had ever formally considered the final draft of the proposed plans, let alone adopted them. The Community Appellate Court agreed and reversed the pivotal Trial Court findings that LSI had adopted the proposed plans. The Appellate Court then held that for the proposed plans to validly exist under Community law, formal action by LSI's Board of Directors was required because the proposed plans would increase officers' compensation. The Appellate Court held that because the plans were never adopted by LSI, and because adoption of the proposed plans by LSI was required by Community law, no benefit plans were created, and Petitioners therefore could not claim the protections of ERISA.

Upon remand, the Community Trial Court ordered the trustees to return all funds to LSI. Petitioners did not appeal that order, and the trust funds have been returned to LSI (and subsequently provided to the Community) and the trust dissolved.

Nine months after the funds were returned to LSI, Petitioners filed a second federal court suit against LSI, again asserting that the Tribal Court lacked jurisdiction to determine the existence *vel non* of the purported plans, and requesting that the District court declare that the proposed plans were properly adopted by LSI. LSI moved to dismiss, asserting the prior tribal and federal court orders were dispositive of the issues Petitioners asserted, and asserting sovereign immunity from suit precluded an exercise of subject matter jurisdiction.

The motion to dismiss was granted in part and denied in part: the District Court dismissed Riverso and Johnson's claims under three of the proposed plans because neither the proposed plans nor ERISA contained a waiver of the Community's sovereign immunity from federal court suit. The District Court did not dismiss the remaining claims. *Prescott, et al. v. Little Six, Inc., et al.*, 284 F. Supp. 2d 1224 (D. Minn. 2003).

LSI appealed the District Court's partial denial of the motion to dismiss. The partial grant of the motion to dismiss was not appealed. In its appeal, LSI asserted that the District Court had committed three independent errors, and that correction of any one of those errors required reversal and remand for dismissal. The United States Court of Appeals for the Eighth Circuit reversed the District Court and remanded for dismissal. In its decision, the Court of Appeals found it necessary to rule on only one

of the three independent grounds for reversal. *Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004).

Petitioners suggested that the Court of Appeals grant *en banc* review. Without even finding it necessary to have LSI provide a response, the Court of Appeals, without dissent, denied the suggestion for *en banc* review.

Petitioners now seek to have this Court review the Court of Appeals decision.

After the Court of Appeals issued its mandate that the District Court dismiss this matter, and for reasons wholly unrelated to the present matter, LSI ceased operations and distributed all of its remaining assets to the Community. LSI was dissolved by Community Court order on January 17, 2005, and all of its remaining assets have been distributed to the Community.

STATEMENT OF FACTS

The Shakopee Mdewakanton Sioux Community is a federally recognized Indian Tribe, 68 Fed. Reg. 68179, 68182 (Dec. 5, 2003), which possesses and exercises all inherent sovereign powers of a tribal government. *Prescott II*, Joint Appendix 144 (hereinafter Jt. App.) (Constitution of the Shakopee Mdewakanton Sioux Community of Minnesota). LSI was an arm and instrumentality of the Community, and was the means through which the Community engaged in lawful gaming activities in compliance with the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"). As a corporation wholly owned by the Community and created under Community laws, LSI shared the Community's sovereign powers. Jt. App. 217

(Articles of Incorporation of Little Six, Inc., Art. 3.1); Jt. App. 156a (Community Business Corporation Ordinance. § 4.11).

Petitioners are former executive officers of LSI, Jt. App. 54 (Complaint ¶¶ 7-10), who, in 1993 attempted to give themselves substantial, unauthorized increases in compensation by establishing various deferred compensation arrangements, naming themselves as beneficiaries, and contributing to their individual plan accounts substantial sums from LSI's revenues. *In re Trust Under Little Six, Inc. Retirement Plans*, 1 Shak. App. Rptr. 182, 189 (Shakopee Mdewakanton Sioux Community App. 2001) (hereinafter *In re Trust*, republished in Appendix hereto) ("here the Claimant's reliance was not induced by their employer – instead it was the Claimants *themselves* who sought to establish these plans for *themselves*." (emphasis in original)).

These proposed plans included a severance pay arrangement known as the "Little Six, Inc. Separation Pay Plan", Jt. App. 79, and three unfunded, non-qualified deferred compensation arrangements: the "Little Six, Inc. Supplemental Retirement Plan", Jt. App. 86; the "Little Six, Inc. Retention Plan", Jt. App. 94; and the "Little Six, Inc. Executive 457 Plan", Jt. App. 102.

None of the proposed plans were ever presented to or approved by LSI's Board of Directors, *In re Trust*, App. 2, so under Community law, none was ever validly adopted or effective. Jt. App. 232 (Article 8.6, stating "officers [of the corporation] shall receive such salary or compensation as may be fixed by the Board of Directors."); *In re Trust*. In *In re Trust*, the Tribal Appellate Court held: "Because we conclude that the trust and plans at issue were never

properly adopted by LSI under Community law, an ERISA plan was never created." *In re Trust*, App. 2. *See also id.* at 11 ("Because these plans were never formally approved by LSI, there is no ERISA plan created that affects the rights of the Claimants").

The proposed plans were to be unfunded, and the plan documents state that benefits were to be provided out of LSI's general assets. Notwithstanding the unfunded status of the Supplemental Retirement Plan, the Retention Plan, and the Executive 457 Plan, Petitioners established a trust known as the "Trust Under Little Six, Inc. Retirement Plans", Jt. App. 298, to hold funds which Petitioners transferred from LSI, which Petitioners hoped would provide a potential source for payment of the compensation which Petitioners were seeking to provide themselves. The trust was intended to be what is commonly called a "rabbi trust".

Consistent with Petitioners' intent to establish a "rabbi trust" for their own benefit, Section 1(d) of the Trust Agreement provides:

> Plan participants and their beneficiaries shall have no preferred claim on, or any beneficial ownership interest in, any assets of the Trust. Any rights created under the Plans and this Trust Agreement shall be mere unsecured contractual rights of Plan participants and their beneficiaries against Company [LSI]. Any assets held by the trust will be subject to the claims of the Company's general creditors. . . .

Trust Under Little Six, Inc. Retirement Plans, Jt. App. 298.

The rabbi trust was intended by those officers of LSI who created the scheme to provide a source of funds from which they could obtain their illegal gains in the unfunded, deferred compensation plans listed in Appendix A to the Trust Agreement. (*Id.*, preambles (b) and (f)). The trust arrangement also was never presented to, nor approved by, the Board of Directors of LSI. *In re Trust* at 6.

Through Resolution LSI-01-12-95-001, the Board of Directors of LSI expressly declined to adopt or approve any of the plans or the trust, and directed the return of the assets of the trust to LSI in accordance with Sections 1(b), 4, and 12(b) of the Trust Agreement. (Jt. App. 322). The Trial Court subsequently approved return of the trust assets to LSI. *In re Trust Under Little Six Retirement Plans*, Order (Shakopee Mdewakanton Sioux Trial Court Mar. 12, 2002), Jt. App. 237. The assets have been returned to LSI, and there is no longer a trust fund related to the proposed plans.

REASONS FOR DENYING THE PETITION

In this matter corrupt former officers of an Indian gaming tribal enterprise wanted to increase their compensation. They knew that, under applicable law, such increases had to be approved by the corporation's Board of Directors. Yet, they purported to establish deferred compensation plans to which they contributed gaming revenues. The Board of Directors did *not* approve the deferred compensation plans. The lack of authorization did not faze Petitioners. They simply acted as if the corporation granted the increase in compensation, and they now claim

that because they acted as if the corporation approved the increases in compensation, they can enforce those increases as *de facto* ERISA plans. The Court of Appeals for the Eighth Circuit found their argument an insufficient basis upon which to permit the petitioners to obtain their illegal and ill-gotten gains.

Petitioners now come to this Court and assert that, other than the decision below, every reported decision from State or federal courts holds that ERISA requires the enforcement of the type of unlawful diversion of corporate funds which Petitioners attempted to perpetrate upon their employer.

This case does not provide a vehicle for resolving any conflict in lower court decisions, nor does it provide a vehicle for clarifying any broad principles of ERISA law. Petitioners presented their argument to the Court of Appeals, that Court analyzed that argument, correctly discussed the applicable law, and then applied that law to the facts of this case. Petitioners do not agree with the Court of Appeals application of the law to the facts of this case, but this case is not one of the few cases which should occupy this Court's time.

I. Petitioners seek to have this Court re-determine a factual issue, but Petitioners do not present any unsettled legal issue.

A. The settled facts of this case do not present the question presented by Petitioners.

Petitioners ask this Court to grant certiorari over the following question:

> Whether federal common law developed under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., must yield to tribal corporate law to determine the enforceability of employee benefit plans established by an Indian tribal corporation in favor of its employees.

The facts of this case clearly do not present that issue. The very core of the Court of Appeals decision is based upon the fact, established as *res judicata*, that there is *not* an employee benefit plan established by an Indian tribal corporation. *See, e.g.*, *Prescott II*, Pet. App. 9 ("Because as a matter of tribal law no benefit plan exists, there is nothing here to which ERISA could apply.").

Petitioners' incorrect factual assertion is based upon findings of the Community Trial Court. But those factual determinations were rejected and reversed by the Community Appellate Court. The Community Appellate Court's reversal of the Tribal Court finding, and the legal effect of that reversal, is the primary issue addressed in *In re Trust*. In *In re Trust*, the appellate Court wrote that the Community Trial Court had found that "LSI had adopted the trust and benefit plans at issue here. Because we agree with LSI that there is *no evidence* in the record that the LSI Board adopted these plans, or the trust in conformance with Community law, we reverse." *In re Trust*, App. 6 (emphasis added)). Petitioners are merely presenting a hypothetical question, based upon the facts as Petitioners want them to be, not based upon the facts of this case. The Court should deny the request to hear the hypothetical question which Petitioners pose.

B. There is no disagreement in the lower courts on the question presented by Petitioners.

Petitioners do not assert that there is a divergence of opinions in the lower courts. In fact, Petitioners cite decisions from the Court of Appeals for the Eighth Circuit, every other United States court of appeals, and several state supreme courts which have reached the issue which their petition presents, all of which hold that federal law is used to determine the enforceability of a benefit plan which an employer has created.

Of particular significance for current purposes, the Court below clearly stated that it agreed with the very rule of law which Plaintiffs seek to present to this Court. *Prescott II* (Pet. App. 8). Judge Bowman, writing for a unanimous Court below, cited with approval and analyzed his own prior opinion in *Kulinski v. Medtronics Bio-Medicus, Inc.*, 23 F.3d 254 (8th Cir. 1994), where the Court held that *if* the employer creates a benefit plan, enforceability of the plan is governed by ERISA. *Prescott II* (Pet. App 8). But, as noted above, the Court rejected Petitioners' arguments because in the present case there was not an "employee benefit plans established by an Indian tribal corporation in favor of its employees." This Court has provided clear notice to its bar that it will rarely grant certiorari to review an alleged misapplication of a properly stated rule of law to the facts, and will rarely review factual disputes. The present falls within both of these categories, and certiorari should be denied.

II. There is no disagreement in the lower courts on the very narrow issue which is presented by the facts of this case.

The issue presented by the facts of this case is very narrow:

> whether federal courts holdings that there can be *de facto* ERISA plans requires that federal courts enforce an attempt by Indian tribal gaming executives to give themselves unauthorized pay raises.

There is not a divergence of opinion in lower courts on the issue which is presented by the facts of this case. As Petitioners themselves note, all federal courts, including the Court of Appeals for the Eighth Circuit, recognize the rule that the courts will impose *de facto* plans on employers when the facts warrant that equitable remedy. In both the Community Court and the federal courts below, Petitioners asserted that application of the *de facto* plan rule to the present case should result in a *de facto* plan in favor of petitioners. Both courts correctly rejected Petitioners' attempt to stretch the *de facto* plan rule to the facts of this case, and this Court should not use its resources to determine if the Court of Appeals misapplied the uniformly accepted *de facto* plan rule to the unique facts of this case.

A. The rule regarding *de facto* plans cannot be used to provide benefits to executive officers who, without their employer's approval, sought to establish ERISA plans for themselves.

While all lower courts have adopted the *de facto* plan rule, no court has ever enforced a *de facto* plan in favor of

executive officers who purported to create the plans for themselves, in violation of the governing corporate documents and corporate law pursuant to which the entity existed. The lack of divergence in the courts below, by itself, strongly counsels against granting certiorari.

The merits of Petitioners' attempt to apply the *de facto* plan rule to their factual context provides additional basis for denying the writ of certiorari.

Consistent with standards of corporate governance generally, LSI's executive officers have no authority to increase their compensation. Such pay raises must be approved by LSI's Board of Directors. Jt. App. 232 (LSI Articles of Incorporation, Art. 8, § 8.6).

The reasons corporate officers cannot give themselves unapproved increases in compensation are self-evident.[1]

Despite the clear Community law and LSI Articles of Incorporation on the issue, Petitioners assert that the *de facto* plan rule gives them the right to dramatically increase their own compensation merely by claiming that they had established ERISA plans for their own benefit.

---

[1] Petitioners' attempts to increase their compensation prompted investigation by the Shakopee Mdewakanton Sioux (Dakota) Community Gaming Commission, and served, *inter alia*, as the basis for revocation of Prescott's gaming license. *See In re Leonard Prescott*, #94-0024, Findings of Fact (Shakopee Mdewakanton Sioux Community Gaming Comm'n 1994), *aff'd, In re Leonard Prescott Appeal from 7/1/94 Gaming Commission Final Order*, 1 Shakopee App. Rptr. 146 (Shakopee Mdewakanton Sioux Community App. 1999). Similar conduct has recently been the focus of investigation and prosecution by federal authorities in cases involving Enron Corp., WorldCom, Inc., McKesson Corp., Arthur Anderson, Tyco International, Inc., and Global Crossing, Inc.

Petitioners cite *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*) for their claimed federal right to give themselves pay raises. *Donovan* holds that where an entity's actions cause a reasonable employee to believe that the corporation has created an ERISA plan for the benefit of the employee, courts can recognize the *de facto* existence of ERISA plans. *Id.* at 1373. The enforcement of *de facto* plans is premised on equitable principles, and relies on the same rationale as promissory estoppel:

> [T]here can be no doubt that ERISA was enacted for the purpose of assuring employees that they would not be deprived of their reasonably-anticipated pension benefits; an employer was to be prevented from "pulling the rug out from under" promised retirement benefits upon which his employees had relied during their long years of service.

Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1408 (2nd Cir. 1985). The lower courts have held that to accomplish ERISA's intended purpose, if an employer led its employees to believe that a benefit plan had been adopted, the employer should not then be able to deny that a plan existed. *Id.*

LSI wholly agrees with this principle, and chose to abide by it, even though not compelled to do so by federal law. As shown in this matter, where LSI's *non-executive* employees were led to believe that a plan had been established, and those employees might have relied upon that belief, LSI ratified the plans. Jt. App. 322 (LSI Resolution 01-12-95). On the other hand, where the intended beneficiaries were senior executive officers such as the Petitioners, who knew the proposed plans had never been

approved or adopted, there was not justified reliance, because those executives knew otherwise.[2]

Other than the now-vacated District Court decision below, no federal Court has ever applied the *de facto* plan analysis in favor of the very officers whose actions are alleged to have created the *de facto* plan. Despite exhaustive research, LSI has not even been able to locate any other case from any federal court, where an executive officer knew the compensation scheme he created was not properly authorized, yet attempted to claim he was misled into believing he was a participant in an approved plan. *See, e.g., Kenney v. Roland Parson Contracting Corp.*, 28 F.3d 254 (8th Cir. 1994) (masonry contractor misled bricklayer regarding existence of a plan); *Moeller v. Bertrang*, 801 F. Supp. 291 (D.S.D. 1992) (auto shop owner established a plan but then attempted to cancel it and deprive retirement benefits to a mechanic).

LSI has previously challenged Petitioners to cite even one case which supports their *de facto* plan argument, but the closest Petitioners have been able to come is *Bennett v. Gill & Duffus*, 1987 WL 34256 (S.D.N.Y. Dec. 29, 1987). *Bennett* falls far short of the facts in this matter. In *Bennett*, the Court held that sixteen employees could pursue their claim that there was a *de facto* plan. While one of the plaintiffs in the case was an executive of a subsidiary of the corporation, the plan at issue was created by the parent corporation, and the subsidiary's executive had not

---

[2] Because enforcement of *de facto* ERISA plans rest on equitable principles, equitable defenses apply. Here, Petitioners have unclean hands, for they seek ERISA's protection for their acts violating Community law and diverting gaming revenues to their personal use. Consequently, Petitioners would not be eligible for equitable remedies.

taken part in creating the alleged plan. As in all other cases finding *de facto* plans, the subsidiary's executive had been misled by his employer, the parent corporation. Petitioners cannot even point to any case which enforces a *de facto* plan in favor of any executive against the executive's own corporation, and petitioners lack any support for their assertion that the *de facto* plan should be applied to the facts of the present matter: executives who seek to both create and enforce a *de facto* plan.

In stark contrast to the cases which enforce *de facto* plans, LSI did not mislead Petitioners into believing that a plan existed. Prescott was the corporate CEO and was the *Chairman* of the Board of Directors, the very body required by Community law to have approved the proposed plans, Johnson was at every Board meeting where such matters were discussed, and Riverso participated in discussions of and was privy to all actions of the Board. Petitioners knew these proposed plans were never properly approved. They cannot now seek to have the courts create a *de facto* plan by claiming they thought there was a plan, when they clearly knew the Board had never approved the proposed plans, and that such approval was a necessary prerequisite to receiving the compensation the plans contemplated.

As the Tribal Appellate Court correctly held in the portion of its opinion which addressed Petitioners' claim that there were *de facto* plans, "here the Claimant's reliance was not induced by their employer – instead it was the Claimants *themselves* who sought to establish these plans for *themselves*." *In re Trust*, App. 9 (emphasis in original). The Tribal Appellate Court was correct: where Community law requires that executive officer compensation must be set by LSI's Board of Directors, ERISA does

not give those executive officers a federally enforceable right to increase their own compensation, in contravention of Community law.

B. This Court should not grant certiorari to determine the narrow issue of how the rule regarding *de facto* ERISA plans applies to tribally owned and chartered corporations which operate Indian Gaming Facilities.

Other than the federal District Court below, no federal court has ever applied the *de facto* plan rule to a gaming facility which is subject to the Indian Gaming Regulatory Act. The unique context in which the present case arises would significantly effect the analysis in this case, and the lack of case law in the lower courts, and the complete lack of any divergence in the lower courts, counsels against this Court hearing this case of first impression.

The reasons senior executive officers of an Indian gaming enterprise cannot give themselves unapproved increases in compensation are even more compelling than the reasons non-gaming executives cannot increase their own compensation. Senior executive officers of an Indian gaming enterprise are held to higher standards of conduct generally than are the senior executives of non-gaming enterprises. Because maintaining the integrity of Indian gaming requires strict compliance with all applicable laws, rules, and regulations, especially those governing access to and protection of the gaming enterprise's monetary assets, any unauthorized or improper appropriation of those assets is especially egregious. The inventory of a gaming enterprise is money, consequently employees are carefully monitored to ensure the protection of the enterprise's funds, and any unauthorized appropriation of the casino's

funds for personal purposes is strictly prohibited. *See, e.g.*, 25 U.S.C. §§ 2703(9); 2710(b)(2)(B) (requiring that tribal gaming laws limit use of gross gaming revenue to those purposes stated in the cited sections). The integrity of Indian gaming rests on the absolute integrity of those responsible for management and operation of gaming enterprises; senior executives must therefore avoid even the appearance of impropriety.

Because Congress enacted the IGRA "to provide a statutory basis for the regulations of gaming by an Indian tribe adequate to shield it from . . . corrupting influences," 25 U.S.C. § 2702(3), senior management of an Indian gaming enterprise cannot be permitted to deviate from laws, rules and regulations governing their conduct, especially those which govern how funds of an Indian gaming enterprise can be used by executives. If senior executives of a tribal gaming enterprise are permitted to ignore tribal laws governing gaming, and are allowed by the courts to unilaterally increase their compensation without obtaining approvals mandated by tribal law regulating gaming, then the integrity of Indian gaming will be the victim. Such a result defeats Congress' purpose when enacting the IGRA.

The *de facto* plan rule is a well-established equitable rule. Whether it applies to the executive officers who bring the present petition, and whether and how the Indian Gaming Regulatory Act impacts the equitable analysis of the *de facto* plan rule, are the types of fact specific issues which should not occupy this Court's time. Particularly in the present matter, where Petitioners do not even allege a divergence of opinions in the lower courts, this Court should deny the request for a writ of certiorari.

III. The holding which Petitioners seek to have this Court review is only one of several barriers to federal court judgment in this matter.

As discussed in LSI's statement of the case, LSI presented three independent arguments to the Court of Appeals, and the Court only found it necessary to rule on only one of those issues. The Court below did not reach LSI's very strong arguments that LSI has not waived its sovereign immunity from suit, nor did the Court reach the legally and factually complex arguments that ERISA does not apply to LSI. LSI's current lack of assets and its January, 2005 dissolution present additional impediments to relief.

Petitioners concede that LSI has sovereign immunity from suit, and concede that ERISA does not waive LSI's sovereign immunity. Petitioner Prescott asserts that the Community Corporation Ordinance waives the Community's immunity to Prescott's federal court suit, and LSI does not agree with Petitioners' strained interpretation of the Community statutes.[3] Petitioners also assert that language in the summary plan descriptions of the alleged *de facto* plans waives the Community's immunity. But imposition of a *de facto* plan based upon equity could not provide the express waiver of immunity, as explicitly required by Community statutory law and by this Court's prior holdings. LSI's sovereign immunity would either prevent this Court from reaching the merits of this case or would prevent the Court of Appeals from reinstating the District Court order even if Petitioners were to prevail in

[3] Whether the purported waiver in the Corporation Ordinance has any remaining effect, now that the corporation has been liquidated and dissolved appears to be an unsettled question of Community law.

this Court. LSI's arguments regarding the applicability of ERISA to a gaming entity which provides the sole income to an Indian Tribe provides further substantial impediment to Petitioners' attempt to retain relief. Combined, LSI's arguments on the merits of the present case, its arguments regarding sovereign immunity, and its arguments regarding the applicability of ERISA make it extremely unlikely that Petitioners would prevail even if this Court were to grant certiorari.

CONCLUSION

Granting the writ of certiorari would not develop the law, would not resolve any divergence of opinions in the lower courts, and would not address other legal bars to petitioners' claims. It would merely reaffirm that the Court of Appeals correctly applied the existing legal rules to the unique and limited facts of Petitioners' attempt to give themselves increases in compensation. For all of the reasons stated in this response, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BLUEDOG, OLSON & SMALL, P.L.L.P.

JEFFREY S. RASMUSSEN
Counsel of Record for Respondents
STEVEN F. OLSON
5001 West 80th Street, Suite 500
Minneapolis, Minnesota 55437
(952) 893-1813

April 5, 2005

IN THE COURT OF APPEALS FOR THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In re: Trust Under Little Six, Inc. Retirement Plans Robert Burns, John Somers, Plaintiff-Interpleaders, v. Little Six, Inc., Defendant-Intervenor, v. Leonard Prescott, F. William Johnson, and Peter Riverso, Defendant-Intervenors.	Ct. App. No. 024-00

MEMORANDUM OPINION AND ORDER

(Filed Oct. 26, 2001)

INTRODUCTION

In this appeal, we must decide if the Court has subject matter jurisdiction over a dispute involving a trust funded to support employee benefit programs at Little Six, Inc. Plaintiffs are trustees of the trust, and Defendant-Intervenor Little Six, Inc. (LSI) and Defendant-Intervenor Prescott, Johnson, and Riverso (the Claimants) hold conflicting claims to the trust assets. The Claimants assert that the trust and associated benefit plans were properly

created under Community law and that they are each due benefits under the plans. LSI claims the trust and the plans were not validly created and that the trust is revocable and its funds should be returned to LSI. The trustees of the trust filed a petition, and then an Interpleader Complaint, seeking this Court's guidance about how they should proceed in the face of these conflicting claims. The Interpleader Complaint also requests other relief not necessarily associated with the dispute between LSI and the Claimaints, namely for this Court to approve the trustees' accounting of the trust funds and to approve other actions undertaken by the trustees.

The Trial Court first addressed whether it had jurisdiction to hear this matter. After briefing and an evidentiary hearing, the Trial Court concluded that the benefit plans and trust were properly created under Community law, and that these plans are governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1500. The Trial Court then held that under ERISA, this Court lacks subject matter jurisdiction over this dispute, and the Interpleader Complaint was therefore dismissed.

On appeal, LSI argues the Trial Court erred. Specifically, LSI argues that ERISA does not apply to Tribes, and that even if it did the trust and plans at issue here are not subject to ERISA. LSI urges this Court to accept jurisdiction over this dispute and order that the trust funds be returned to LSI.

Because we conclude that the trust and plans at issue here were never properly adopted by LSI under Community law, an ERISA plan was never created, and this Court may entertain this dispute. Since the trust document

signed by Prescott and Johnson provides that the trust will remain revocable in the absence of LSI Board approval, we conclude that the trustees may return the trust funds to LSI without fear of liability. We therefore dismiss the claims presented by the Claimants, and remand for the Trial Court to entertain the other requests for relief from the trustees.

FACTUAL BACKGROUND

LSI is a corporation chartered under the laws of the Shakopee Mdewakanton Sioux (Dakota) Community (the Community) and it is wholly owned by the Community. *See* Article of Incorporation of Little Six, Inc. § 4. Leonard Prescott, William Johnson, and Peter Riverso served as officers, directors and/or managers of LSI from its inception in 1991 until late 1994-early 1995. It was during this time period that the benefit plans and trust at issue in this suit came into being.

We agree with the Trial Court that this dispute involves five different plans and a related trust. The evidence shows that from 1992 until January, 1995, LSI administered and either paid actual cash benefits, or credited cash amounts to deferred accounts, for various LSI employees under at least five different benefit plans. *See, e.g, In re Trust under LSI Retirement Plans*, No. 055-95 (SMS(D)C Tr. Ct. March 29, 2000) at 9; LSI Trial Ex. 19-21, 54; Claimants' Trial Ex. 1039-1047, 1094-95,1101, 1105-06, 1115-1119. The five plans are:

– The LSI Life Insurance Plan

– The LSI Executive 457 Plan (457 Plan)

– The LSI Separation Pay Plan

– The LSI Supplemental Retirement Plan (SERP)

– The Retention Plan (sometimes referred to as SERP II)

These plans included more beneficiaries than just Prescott, Johnson, and Riverso. *See e.g.*, Original Trust Petition.

In the hearing below, Prescott, Johnson, and Riverso presented evidence that the plans were created as a bona fide effort to retain qualified high level employees, particularly in light of the restrictions placed on the ability of a tribal corporation to offer standard employee benefit programs, such as stock options or 401K plans. Transcript of 10/5/99-10/7/99 Hearing (Tr.) at 632, 247, 732. LSI, on the other hand, argued that these plans were initiated and executed by Prescott and Johnson in an attempt to covertly compensate themselves with little scrutiny from others within LSI or the Community. *See* Appellant LSI's Reply Brief, at 6-7; Post Hearing Brief of LSI at 4-5.

To secure funding for at least some of these plans, a trust was established. LSI Trial Ex. 5. On March 25, 1993, on behalf of LSI, Prescott and Johnson signed a trust instrument naming Burns and Somers as trustees. LSI Ex. 5. Section (d) of the preamble to the trust document makes it clear that the parties to the trust contemplated that it would be associated with the employee benefit plans involved in this case. *Id.* In addition, the trust instrument states that the trust will only become irrevocable if it is approved by the LSI Board of Directors. LSI Ex. 5 at 1(b).

Prescott, Johnson, and Riverso all left LSI by early 1995. By that time, a new Board of Directors had been

slated and the new Board passed a resolution on January 14, 1995 specifically stating that it had never adopted or approved any of the benefit plans involved in this dispute. LSI Trial Ex. 26. The Board also noted it had never formally adopted the trust used to secure funding for these plans, and the Board specifically directed the trustees to return the trust funds to the Community. LSI Trial Ex. 26. This resolution did acknowledge that LSI had incurred liabilities under the 457 Plan and SERP I for the period between 1/1/93 and 12/31/94, and that LSI would authorize payments for these periods under the terms of the plans. *Id.* However, the resolution stated that no additional amounts would be credited to participants in these plans after December 31, 1994. *Id.* The resolution also unilaterally terminated the Life Insurance Plan. *Id.*

Since the request from LSI to return the trust assets conflicted with the actions of the trustees to date, and since the trustees were aware that the beneficiaries held conflicting claims to the trust funds, the trustees filed a petition in this Court for an order approving their actions, and requesting guidance on how to proceed in the future.

Almost contemporaneously, Prescott and Johnson filed a complaint in federal district court alleging that the trust and benefit plans were subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1500, and that under that federal statute they were entitled to relief. The United States District Court did not rule on the merits of Prescott and Johnson's claims, but instead ruled that they must first exhaust their tribal remedies before proceeding in federal court. *Prescott v. Little Six*, 897 F.Supp. 1217 (D. Minn. 1995). Specifically, the District Court concluded that this Court should have the first opportunity to determine if it had jurisdiction to

consider Prescott and Johnson's claims, and it dismissed Prescott and Johnson's claims pending exhaustion of tribal court remedies. *Id.* at 1224.

In an order dated June 19, 1999, the Trial Court allowed Prescott and Johnson to intervene in this action. The Trial Court also denied Prescott and Johnson's motion to dismiss on various grounds, and ordered the trustees to restyle their petition as a Interpleader Complaint under Rule 18 of the SMS(D)C Rules of Civil Procedure. To address the remaining question of subject matter jurisdiction, the Trial Court ordered an evidentiary hearing to be held on whether the trust supporting the benefit plans was approved by LSI or the Community. The Trial Court framed the issue in the following manner: if the trust and benefit plans were properly formed under Community law, it seemed the ERISA would apply and the federal courts would have exclusive jurisdiction; if the trust and benefit plans were not properly formed, Community law provided the Court with a jurisdictional basis to address the claims of the parties.

At the hearing, ten witnesses testified over the course of three days, and the parties have submitted numerous tangible exhibits and documents. After the hearing, the parties submitted briefs. The Trial Court concluded that although there was no evidence that the LSI Board ever formally adopted the trust and the plans, there was sufficient evidence of other actions by LSI to find that its had adopted the trust and benefit plans at issue here. Because we agree with LSI that there is no evidence in the record that the LSI Board adopted these plans or the trust in conformance with Community law, we reverse.

LEGAL DISCUSSION

In their Interpleader Complaint the trustees have asked for an order approving their actions to date, and giving them guidance on how to resolve the conflicting claims to the trust. We agree with the Trial Court that the best way to analyze the issues presented by the trustees' request is begin by determining whether an ERISA plan exists.

Since we conclude that an ERISA plan was not formed as to these particular Claimants, we need not address whether ERISA applies to Indian tribes. We note, however, that our research to date, and the argument of each party, has not identified one case in any jurisdiction that exempts Indian tribes from ERISA's broad reach.[1]

---

[1] Curiously, LSI urges us to follow the reasoning of an Eighth Circuit case not dealing with ERISA, rather than the Seventh or Ninth Circuit cases relied on by the Trial Court, both of which directly address the applicability of ERISA to Indian tribes. Opening Brief of Appellant LSI, at 8-16. In arguing that this Court should stay away from the Seventh and Ninth Circuit cases that hurts its argument, LSI states "where the legal principle upon which the jurisdiction of this Court is predicated have been subject to a decision of the 8th Circuit (as the circuit in which this Court is located), that decision would be considered to control the reach of this Court's jurisdiction." Opening Brief of Appellant LSI. While we do not reach the applicability of ERISA in this case, we do want to be clear on one point. Contrary to LSI's argument, nothing in the Community's Constitution, the jurisdictional ordinances of this Court, the SMS(D)C Court Rules, or this Court's common law, delegate jurisdictional questions, or the resolution of any factual or legal issues, to the determination of the Eighth Circuit, or the courts of any other sovereign. While we have consistently encouraged litigants to refer us to authority from other jurisdictions for guidance in resolving novel legal issues, there is nothing in this Community's law that makes the decisions of any other jurisdiction binding on this Court.

An ERISA plan does not exist as to these Claimants because, the trust and benefit plans were not properly adopted by LSI. LSI argues that there is no evidence in the record that LSI formally approved these plans or the trust, that the LSI Board could not have approved these plans and trust without a conflict of interest, and LSI maintains that Prescott and Johnson did not have the authority to enter into the trust agreement because § 8.6 of the LSI Articles of Incorporation reserves the right to set officer compensation exclusively to the LSI Board of Directors.[2] *See* Opening Brief of Appellant LSI, at 23-24; Reply Brief of Appellant LSI, at 2-7; LSI Post Hearing Brief at 17.

Indeed, there is no evidence in the record that the LSI Board ever expressly approved the trust or the associated plans. In fact, there is evidence that suggests that at least some of the former LSI Board members do not ever recall approving or discussing the trust or plans. *See, e.g.*, Transcript of 10/5/99-10/7/99 Hearing (Tr.) at 33-38, 369-370. We also note that we have not been able to find any reference to the trust in any of the minutes or notes from LSI Board meetings in the record below (although there are some ambiguous references to some of the plans in question here).

To be fair, this is hardly an easy case. LSI concedes in its brief that there is support in the record for at least some of the Trial Court's conclusions. For example, LSI does not argue on appeal that these plans and the trust

---

[2] Section 8.6 of the LSI Articles of Incorporation states, "The officers [of LSI] shall receive such salary or compensation as may be fixed by the Board of Directors." LSI Ex. 4.

never existed in some form, or that there were no references in various corporate records to some of the plans. *See* Appellant's Little Six, Inc.'s Opening Brief, at 26. And we certainly do not dispute the Trial Court's conclusion that the time period in question was a turbulent one in which records may have been lost or never created. However, at the end of the day, we simply cannot impute to LSI liability on these plans without some evidence that LSI formally intended to adopt or approve the trust or plan documents in accordance with its Articles of Incorporation. To do so would be to ignore the carefully crafted body of corporate law laid out in this Community's Corporation Ordinance and in LSI's Articles of Incorporation.

Claimants argue that formal approval of the trust and plans is not required. They cite to federal ERISA cases that show that federal courts generally look to the totality of the circumstances when deciding if an ERISA plan exists. *See, e.g., Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982). We understand these cases to be based on the principle that an employer should not be able to entice employees with promises of future benefits, and then later claim the benefit plans were ineffective because of a formalistic technicality. *See generally Donovan*, 688 F.2d at 1370; *Bennett v. Gill & Duffus Co.*, 1987 U.S. Dist. Lexis 12037, at 12-14; 29 U.S.C. § 1001 (purpose of ERISA is to protect employees and their dependents). However, we agree with LSI that the facts in this case are different than those federal cases. Here, the Claimant's reliance was not induced by their employer – instead, it was the Claimants *themselves* who sought to establish these plans for *themselves*. For example, in *Bennett,* the question was whether an employer had created a plan by informally distributing some severance benefits to certain workers.

Bennett, at 12-14. In contrast, in this case it was Claimants themselves who acted as both the employer and employee. If there was anyone who was responsible for insuring that these plans were formally approved, it should have been the Claimants. The principles underlying those federal cases simply do not extend to protect the Claimants under the particular facts of this case.

The Claimants also argue that LSI ratified these plans and the trust by not renouncing them earlier. The new LSI Board, however, did not take office until 1994, and arguably did not receive reports concerning the existence of the plans and trust until May or June of 1994. Given the testimony below concerning the state of LSI record keeping and business practices, it was not unreasonable, under these specific facts, for the Board to take action with respect to the plans until six months later in January 1995. That six month period is not a timeframe during which Claimants can claim reliance. We conclude, therefore, that LSI failed to ratify these plans or the trust.

The text of the trust instrument, and the testimony below from trustee Burns, indicate that even after Prescott and Johnson signed the trust documents, the trust would only become irrecovable upon approval by the LSI Board. *See* LSI Trial Ex. 5 at § 1(b). Evidence of that approval is simply missing from the record, and we cannot expect the trustees to treat the trust as irrevocable in the absence of formal Board approval. We would not want to place the trustees in this case, or in future cases, in a position where they would have to make distinctions between whether LSI has formally approved a trust document, informally ratified it, informally rejected it through inaction, or formally rejected it. Imputing approval of the trust and plans to LSI based on the conflicting evidence in

the record below would create precedent in this Court which would make it more difficult for outside professionals hired as trustees for Community resources to do their jobs. We believe the more prudent route is to hold that in the absence of Board approval in conformance with the LSI Articles of Incorporation, there is no evidence LSI approved the trust or the plans, and the trust is therefore revocable.

Since the trustees' original interpleader complaint requests relief broader than the issues presented in this appeal, we remand this case with very specific instructions. Because these plans were never formally approved by LSI, there is no ERISA plan created that affects the rights of the Claimants. Because the trust was never formally approved by the LSI Board, the trust, by its terms, is revocable, and LSI, as grantor of the trust, is able to revoke the trust. The trust agreement itself states that "Plan participants and their beneficiaries shall have not a preferred claim on, or any beneficial ownership interest in, any assets of the Trust." LSI Trial Ex. 5, at § 1(d). Claimants, therefore, are dismissed from this action because they no longer have an interest in this litigation as articulated in their original motion to intervene or in their answer.

On remand, the trustees are free to present their accounting, consistent with this opinion, to the Trial Court. If necessary, the Trial Court is obviously free to take additional evidence on any of the remaining questions under the trustees' original interpleader complaint.

ORDER

For the foregoing reasons, the Trial Court is reversed, the Claimants are dismissed from this action, and the case is remanded to the Trial Court in order to conduct further proceedings consistent with this opinion.

Dated: October 26, 2001

/s/ Henry Buffalo
Judge Henry M. Buffalo Jr.

/s/ Robert Grey Eagle
Judge Robert A. Grey Eagle